A.F.R.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Justice Vijay Kumar Shrivastava

Writ Petition No. 947 of 2004

Avanish Jyotishi

Vs.

High Court of Chhattisgarh & Others

ORDER

Post for 11-12-2006

Sd/-
V.K. Shrivastava
Judge

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HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

Single Bench : Hon'ble Shri Vijay Kumar Shrivastava, J

Writ Petition No. 947 of 2004

Petitioner : Avanish Jyotishi, S/o Shri R.P. Jyotishi, Aged about 34 years, R/o MIG-7 Chandni Apartment, Narmada Nagar, Bilaspur (CG).

Versus

Respondents :

1. High Court of Chhattisgarh, Through : Registrar General, High Court of C.G., Bilaspur (CG).
2. Additional Registrar (D.E.), High Court of Chhattisgarh, Bilaspur (CG).
3. Shri Gopal Singh, son of not known, Private Secretary, High Court of Chhattisgarh, Bilaspur.
4. Shri A. Annajee Rao, son of not known, Private Secretary, High Court of Chhattisgarh, Bilaspur.
5. Shri R. Satyanarayana Raju, son of not known, Private Secretary, High Court of Chhattisgarh, Bilaspur.
6. Shri M.V.L.N. Subrahmanyam, son of Shri M.V. Kameswara Rao, Private Secretary, High Court of Chhattisgarh, Bilaspur.
7. Shri Avanish Kumar Pathak, son of Shri P.D. Pathak, Private Secretary, High Court of Chhattisgarh, Bilaspur.

Present :-

Shri P.S. Koshy and Shri Vinod Deshmukh, counsel for the petitioner.

Registrar General, Chhattisgarh High Court with Dr. N.K. Shukla, Sr. Advocate with Shri Dilip Dubey, counsel for respondent No.1.

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Shri Manindra Shrivastava, Sr. Advocate with Shri Amrito Das and Shri Akhilesh Dalpati, counsel for respondent No.2.

None for respondent No.3.

Shri Manoj Paranjape, counsel for respondents No.4, 5 & 6.

Shri Roop Naik, counsel for respondent No.7.

ORDER

(Delivered on 11th December, 2006)

This petition under Article 226/227 of the Constitution of India has been preferred by the petitioner for fixation of *inter se* seniority amongst petitioner and respondents No.3 to 7.

2) Petitioner and respondents No.3 to 7 were initially appointed as Stenographers in the erstwhile State of Madhya Pradesh. After reorganization of State of Chhattisgarh in the year 2000 all of them opted for the State of Chhattisgarh and accordingly they were allocated. They joined their services as Stenographers in the High Court of Chhattisgarh on 1st November, 2000. Their seniority in the cadre of Stenographer was as below :

1) Shri Avanish Jyotishi
2) Shri Gopal Singh
3) Shri Alena Annaji Rao
4) Shri R. Satyanarayana Raju
5) Shri M.V.L.N. Subramaniyam
6) Shri Avanish Kumar Pathak

3) Petitioner and respondents No.3 to 7 were governed by High Court of Madhya Pradesh, Officers and Employees Recruitment and Conditions of Service (Classification, Control, Appeal & Conduct) Rules, 1996 (henceforth "Rules") and even after their joining to the State of Chhattisgarh they were governed by it, till the present rules i.e. Chhattisgarh High Court Establishment (Appointment and Conditions of

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Service) Rules, 2003 came into force with effect from 1-10-2003. In Rule 8 of Rules, procedure for promotion to the post of Private Secretary has been described. The post of Private Secretary was required to be filled by promotion from amongst the Personal Assistants on merit-cum-seniority and if necessary, by direct recruitment. Rule 9 prescribes qualification for the post of Private Secretary. According to it the candidate must be a Graduate from any Recognized University and he must also be qualified in English Shorthand from a Recognized Board of Shorthand and Typewriting Examination with a speed of 100 words per minute. Graduation in law has been given preference. Rule 21 of Rules reads as below, which authorizes the Chief Justice to relax the rules :

> "**21.** Nothing in these Rules shall be construed to limit or abridge the powers of the Chief Justice to deal with Employees of the Court in such manner as may appear to him to be just and reasonable :
>
> Provided that where any Rule is applicable to an Employee of the Court, his case shall not be dealt with in the manner less favourable to him than that provided by the said Rules."

4) None of the above employees was working in the cadre of Personal Assistant, but considered for promotion to the post of Private Secretary by the Departmental Promotion Committee (henceforth "the DPC") constituted by the Chief Justice for promotion to the post of Private Secretary.

5) The DPC considered petitioner and respondents No.3 to 7 for promotion to the post of Private Secretary and resolved as below :

> "Considered the cases of the following Stenographers :-
>
> 1. Shri Avanish Jyotishi
> 2. Shri Gopal Singh

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3. Shri Alena Annaji Rao
4. Shri R. Satyanarayana Raju
5. Shri M.V.L.N. Subramaniyam
6. Shri Avanish Kumar Pathak

The above Stenographers from Serial No.(2) to (6) are recommended for promotion against the vacant permanent posts.

Shri Avanish Jyotishi, at Serial No.(1), has passed English Shorthand examination at the speed of 80 (eighty) words per minute, whereas for the post of Private Secretary, a candidate must have passed Shorthand examination at the speed of 100 (hundred) words per minute from any recognized Board. *Looking to records and overall performance of Shri Avanish Jyotishi, the requisite qualification of minimum speed may be relaxed and he may be promoted provisionally with the condition that he must pass English Shorthand examination at the speed of 100 (hundred) words per minute from any recognized Board within a period of two years.* After submitting by Shri Avanish Jyotishi the pass certificate of English Shorthand examination at the speed of 100 words per minute from any recognized Board, he will be considered for regular promotion."

6) As per recommendation of the DPC, petitioner and respondents No.3 to 7 were appointed to the post of Private Secretary, however, petitioner who was not carrying speed of 100 words per minute in Shorthand was promoted on a condition that he must pass English Shorthand examination at the speed of 100 words per minute from any recognized Board and submit the pass certificate within a period of two years from the date he assumes charge of his duties, after submitting the above pass certificate by him he will be considered for regular promotion. Thereafter petitioner passed the prescribed examination and submitted his certificate. Again vide order No.22/II-14-1/2001 dated 1-10-2002, his promotion was regularized with effect from 20-8-2001 i.e. the date on which he passed the examination. Subsequently confirmation order was

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passed by order of Chief Justice bearing order No.5(A)/II-14-1/ 2003 (Part-IV) dated 6-1-2004 wherein seniority of petitioner was placed at the bottom of the list and respondents No. 3 to 7 who were junior to him in the cadre of Stenographer were placed above him.

7) Feeling aggrieved the petitioner preferred representation dated 14-1-2004 for fixation of his *inter se* seniority. His representation was rejected by order of Chief Justice dated 16-2-2004 and the same was communicated to him vide memo No.1010/II-14-1/2004 (Part-IV) dated 20-2-2004, hence this writ petition.

8) Respondents No.1 and 2 contested the claim of the petitioner on the ground that on 18-5-2001 when DPC considered the matter of promotion to the post of Private Secretary, petitioner was lacking requisite qualification of English Shorthand with a speed of 100 words per minute, therefore, he was provisionally and conditionally promoted whereas respondents No.3 to 7 having requisite qualification were promoted on regular basis. Subsequently petitioner obtained the requisite qualification and, therefore, from the date of acquisition of requisite qualification his services were regularized. Petitioner is stopped to claim promotion from the date on which he was not having requisite qualification. Respondent No.7 also contested the claim of the petitioner on the ground that the promotion was considered on merit-cum-seniority basis and respondents No.3 to 7 possessed better merit than the petitioner on the date of consideration for promotion because on that date petitioner was holding the qualification of 80 words per minute whereas others were holding the qualification of 100 words per minute, therefore, petitioner, who fulfill the

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eligibility criteria after respondents No.3 to 7 has no right to be placed in seniority before them.

9) Learned counsel appearing for all the parties were heard at length.

10) For fixation of *inter se* seniority the Hon'ble Apex Court from time to time has led law. Some of the judgments wherein law relating to *inter se* seniority has been considered by the Hon'ble Apex Court and law laid down therein, applicable to the present case are quoted below.

The Hon'ble Apex Court, in the case of **Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and others**[1], at para 47 held as under :

> **47.** To sum up, we hold that :
>
> (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.
>
> The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
>
> (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.
>
> (C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are

[1] (1990) 2 SCC 715

framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out

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any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold :

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final.

In view of the above and the other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave petitions which are accordingly dismissed. There will be, however, no order as to costs."

The Hon'ble Apex Court, in the case of **Excise Commissioner, Karnataka and another vs. V. Sreekanta**[2], held as under :

"Service Law – Seniority – Determination of – Ad hoc appointment, whether to count for – Ad hoc appointee subsequent to such appointment becoming eligible for appointment only under a new set of rules, appointed thereunder temporarily with prospective effect and placed on probation – In such circumstances, held, seniority would be counted not from the date of the initial ad hoc appointment but from the date of the subsequent appointment or regularisation under the said rules – Karnataka State Civil Services (Direct Recruitment to Class III Posts) (Special) Rules, 1970, Rules 6, 3 and 4 – Karnataka Government Servants (Seniority) Rules, 1957, Rule 1-A – Appointment – Ad hoc appointment – Regularisation."

The Hon'ble Apex Court, in the case of **Mohan Lal and others vs. State of H.P.**[3], held that :

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[2] (1993) Supp (3) SCC 53
[3] (1997) 4 SCC 416

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"The candidates who passed the examinations within two years and were confirmed after passing the tests, would get seniority from the respective dates of their joining the post and the date of passing the departmental test relates back to the date of appointment. Those who passed the examination after two years, would get seniority from the date of passing and would rank junior to those who passed the examination within two years."

The above view was taken by the Hon'ble Apex Court considering the prevalent following rules :

"11.(1)Persons appointed to the service shall remain on probation for a period of two years :

Provided that ---

(a) the incumbents shall within two years of the appointment, pass the departmental examinations prescribed by the Government from time to time and;

(b) the Government may exempt in exceptional cases any person from passing any or all such departmental examinations :

Provided further that ---

(a) any period, after such appointment, spent on deputation on a corresponding or higher post shall count towards the period of probation.

(b) any period of officiating appointment to the Service shall be reckoned as period spent on probation, but no person who has officiated shall, on completion of the prescribed period of probation, be entitled to be confirmed unless he is appointed against a permanent post/vacancy.

(2) If, in the opinion of the appointing authority, the work or conduct of a person during the period of probation is not satisfactory or he fails to pass the prescribed departmental examination within two years of his appointment, it may ---

(a) if such person is recruited by direct appointment, dispense with his services and

(b) if such person is recruited otherwise ---

(i) revert him to his former post; or

(ii) deal with him in such other manner as the terms and conditions of the previous appointment permit.

(3) On the completion of the period of probation of a person and passing the prescribed examination the appointment authority may ---

(a) if his work and conduct is found satisfactory ---

(i) confirm such person from the date of his appointment if appointed against a permanent vacancy; or

(ii) confirm such person from the date from which a permanent vacancy occurs; if appointed against a temporary vacancy; or

(iii) declare that he has completed his probation satisfactorily if there is no permanent vacancy; or

(b) if his work or conduct has not been, in its opinion, satisfactory and in the case of non-passing of prescribed departmental examination ---

(i) dispense with his services, if appointed by direct appointment or if appointed otherwise revert him to his former post, or deal with in such other manner as the terms and conditions of his previous appointment; permit; or

(ii) extend his period of probation and thereafter, pass such orders as it could have passed on the expiry of the first period of probation. This shall also apply mutatis mutandis to the departmental examinations :

Provided that the total period of probation and the time allowed for passing the departmental examinations, including extension, if any shall not exceed four years."

The Hon'ble Apex Court, in the case of **Sanjay K. Sinha-II and others vs. State of Bihar and others**[4], held as under :

[4] (2004) 10 SCC 734

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"Service Law – Seniority – Determination of seniority – Date of substantive appointment – Relevance of – Held, seniority is to be reckoned with reference from the date of substantive appointment under relevant rules – When the posts to which appointments were to be made were not available or non-existent, there was no appointment to the service, much less substantive appointment and, therefore, such appointees cannot be given seniority from the purported date of their appointment – Bihar Forest Service Rules, 1953, R.35."

The Hon'ble Apex Court, rendering judgment in the case of **Jagdish Kumar & Ors. vs. State of H.P. & Ors.**[5], at para 17 observed as below :

"**17.** The only other question which needs to be adjudicated is the stand of the respondents that the appointment had become really effective on the date of passing the departmental examination. This plea is equally untenable on account of the fact that the appointment itself takes effect from the date of appointment and in the event of not passing the examination the consequences follow. But that cannot be a ground to hold that there was no appointment in the eye of law till examination is passed. The Government also recognized this position as is evident from declaration of the seniority list on 14-10-1977 wherein the appellants were included in the seniority list though they had not cleared the examination by that time as no examinations were held. In the eye of law the appointment of the appellants was from the date of their initial appointment which of course was conditioned with the requirement of passing the departmental examination. Undergoing any training with the ITI was subsequently substituted by the requirement of passing the departmental examination. A feeble attempt was made to show that at no point of time the authorities have adduced any material to show that the ITI had declined to impart training and, therefore, the substitution of ITI training by the requirement of passing the departmental examination is illegal. The stand is untenable. This plea is only to be noted to be rejected

[5] 2005 AIR SCW 6431

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because of the High Court's finding in clear terms which is as follows :

> 'It is not in dispute that on the concerned Authorities of I.T.Is expressing their inability to provide three months training to the petitioners and other similarly situated persons, the Chief Engineer decided to hold departmental examination by prescribing syllabus for the said examination vide his office order dated 19-2-1980 (Annexure P-3), which the petitioners qualified as per Notification dated 24-5-1980 and in December, 1980.' "

11) The rule does not categorise any promotion in various categories, instead Rule 15 of the Rules prescribes that all promotions from one post to another upto Class II Cadre, be made on temporary or Officiating basis, depending upon the nature of the post by the Chief Justice on the recommendation of the Departmental Promotion Committee constituted by the Chief Justice. Therefore, if one employee gets promotion whatever nomenclature may have been given, yet they will be treated under regular promotion having condition or without condition, either with relaxation or without relaxation. In case there is a condition imposed on any employee in his promotion order, only requirement of the law is that within the stipulated period he should fulfill the condition else department has right to proceed against him in accordance with law and rules, therefore, an employee who was promoted to any cadre is entitled for his *inter se* seniority according to order of promotion and not from the date when he fulfills the condition.

12) Here it is also pertinent to mention that Rule 12 of *Civil Services (General Conditions of Services) Rules, 1961* contemplates that where promotions are made on the basis of selection by a Departmental Promotion Committee, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the

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Committee. Here in the instant case petitioner and respondents No.3 to 7 were considered by the DPC. Petitioner was senior most and thereafter seniority of respondents No.3 to 7 comes. Petitioner was recommended for promotion by relaxing his requisite qualification whereas others without imposition of any condition were recommended for promotion, therefore, it will be presumed that DPC recommended the promotion according to earlier seniority wherein petitioner was on the top, therefore, in accordance with the above rule also the seniority of the petitioner was required to be kept above respondents No.3 to 7.

13) The DPC considered the names of petitioner and respondents No. 3 to 7 against regular vacancy and in accordance with rules recommended at a stroke the name of petitioner and respondents No. 3 to 7 for promotion, however, for petitioner relaxation of rules were recommended and the Chief Justice was pleased to relax the rules for all the candidates so far feeder cadre is concerned, and additional relaxation was allowed to the petitioner towards requisite qualification with a rider that he must acquire the requisite qualification of English Shorthand with a speed of 100 words per minute within a period of two years.

14) From the law laid down by the Hon'ble Apex Court and rules in force applicable to petitioner and respondents No.3 to 7, neither their promotions were ad hoc promotions nor those promotions were without any post or against stop-gap arrangement. All those promotions were made in accordance with the prevalent rules and against regular vacancies. Therefore, their *inter se* seniority was to be fixed according to their earlier seniority and petitioner's continuous service, which he

rendered in the capacity of Private Secretary, was not liable to be ignored on the garb of subsequent acquisition of requisite qualification.

15) In the result, petitioner–Shri Avanish Jyotishi is entitled for placement above respondent No.3 in the seniority list maintained by the department for the posts of Private Secretaries. Accordingly, the writ is allowed and respondent No.1 is directed to place petitioner above respondent No.3 in the seniority list maintained by it. No costs.

Sd/-
V.K. Shrivastava
Judge

Gowri